Supreme Court, U.S.
FILED

(1)

No. 961702 APR 21 1997

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term 1996

LEON DURWOOD HARVEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

Jonathan Shapiro *(Counsel of Record)*
Michael W. Lieberman
JONATHAN SHAPIRO & ASSOCIATES, P.C.
910 King Street
Alexandria, Virginia 22314
(703) 684-1700

Counsel for the Petitioner

THE LEX GROUP • 1205 East Main Street • Suite 2 East • Richmond, VA 23219
(804) 644-4419 • (800) 856-4419 • Fax: (804) 644-3256

30pp

QUESTION PRESENTED

Is it a violation of the Double Jeopardy Clause of the fifth amendment to the United States Constitution to prosecute, convict and punish a defendant for engaging in a Continuing Criminal Enterprise under 21 U.S.C. § 848 when that defendant has been convicted of and punished for conspiracy under 21 U.S.C. § 846 twice previously where the "in concert" element of the CCE was based on the same agreement as the prior conspiracy and where the defendant has already served his full sentences for the previous conspiracy convictions prior to being charged with the CCE?

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT OF CERTIORARI 6

I. The Decision of the United States Court of Appeals for the Fourth Circuit in this Case is in Conflict with this Court's Recent Decision in Rutledge v. United States 6

II. The Decision of the United States Court of Appeals for the Fourth Circuit in this Case is in Conflict with the Decision of the United States Court of Appeals for the Third Circuit in United States v. Grayson 8

CONCLUSION 11

TABLE OF AUTHORITIES

Page(s)

Cases:

Ball v. United States, 470 U.S. 856 (1985) 8, 9

Rutledge v. United States, ___ U.S. ___,
116 S. Ct. 1241 (1996) 6-8

Short v. United States, 91 F.2d 614 (4th Cir. 1937) 7

United States v. Grayson, 795 F.2d 278 (3rd Cir. 1986) .. 8-11

United States v. Harvey, E.D. Va. Crim. No. 214-74-A 3

United States v. Harvey, S.D. Ga. Crim. No. 478-33 4

United States v. Smith, 759 F. Supp. 304 (E.D. Va. 1991) 7

Other Authorities:

21 U.S.C. § 841(a)(1) 4

21 U.S.C. § 952(a) 4

21 U.S.C. § 846 ..... i, 3, 4, 6

21 U.S.C. § 848 ..... i, 6

21 U.S.C. § 848(c) 2

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2255 3

Rules of the Supreme Court
of the United States, Rule 10(a).....10

Rules of the Supreme Court
of the United States, Rule 10(c).....8

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is unpublished, and is reprinted in the Appendix at 1-3 (herinafter "App."). Harvey did not seek rehearing in the Court of Appeals. The opinion of the United States District Court for the Eastern District of Virginia is also unpublished, and is reprinted as (App. at 4-12).

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on January 22, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Double Jeopardy Clause of the fifth amendment to the United States Constitution states:

> ... nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb....

Title 21, United States Code, Section 848(c) states:

> **(c) "Continuing Criminal Enterprise" defined**
>
> For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if --
>
> (1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and
>
> (2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter --
>
> (A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and
>
> (B) from which such person obtains substantial income or resources.

Title 21, United States Code, Section 846 states:

> Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

STATEMENT OF THE CASE

Harvey filed a Motion To Set Aside Sentence And Vacate Judgment Pursuant To Title 28, U.S.C., § 2255 on July 6, 1995 in the United States District Court for the Eastern District of Virginia. The United States filed its Response on August 28, 1995, and Harvey then filed a Reply on September 21, 1995. On September 27, 1995, the district court issued a Memorandum Opinion, and Order, denying Harvey's claims. See (App. at 4-12).

Harvey then appealed the district court's denial of his motion to the United States Court of Appeals for the Fourth Circuit. After briefing by both Harvey and the United States, the court of appeals affirmed the district court in an unpublished per curiam opinion entered on January 22, 1997. See (App. at 1-3).

The facts material to consideration of the question presented are as follows:

In 1974 Harvey was convicted of conspiracy to distribute marijuana, in violation of 21 U.S.C. § 846, in the Eastern District of Virginia. See United States v. Harvey, E.D. Va. Crim. No. 214-74-A. Thereafter, in 1978, he was again convicted of conspiracy to possess with intent to distribute marijuana, in violation of 21 U.S.C. § 846, in the Southern

District of Georgia. See United States v. Harvey, S.D. Ga. Crim. No. 478-33. In 1986, in the underlying case, the government tried, convicted and punished Harvey once again for the same two conspiracies, this time as part of a continuing criminal enterprise (CCE).

The Indictment and the proof at trial showed that Harvey's 1974 and 1978 conspiracy convictions were based on the same agreement that made up the "in concert" element of the CCE and were used in the CCE trial to prove the "in concert" element. In that regard, Count I of the 1986 Indictment (the CCE) charged that,

> [d]uring a period from in or about 1974, the exact date being to the Grand Jury unknown, and continuously thereafter up to and including the date of the filing of this Indictment, in the Eastern District of Virginia and elsewhere, LEON DURWOOD HARVEY ... unlawfully, willfully, intentionally and knowingly did engage in a continuing criminal enterprise, in that the defendant LEE HARVEY ... did violate Title 21, United States Code Sections 841(a)(1), 846 and 952(a) ... in concert with at least five other persons....

(emphasis added). Of the people alleged to have been members of the CCE, at least three, Julian Thomas Pernell, Sidney Larry Pernell and Barry Wayne Toombs, also had been named as co-conspirators in Harvey's 1978 indictment.

Moreover, both the government's arguments and the evidence presented at trial reflected the government's position that the CCE included the same prior conspiracies. The very first witness, Peter Bryon, testified that he began smuggling drugs into the United States with Harvey in 1977. Another government witness, Steven Ravenel, testified that he was involved with Harvey in the marijuana business from 1974 to

sometime in the 1980's, including specifically the importation of a load of marijuana in the fall of 1978. Barry Toombs testified that he and Harvey were introduced in 1975 for the purpose of discussing marijuana dealing, that they were co-conspirators from 1977 through 1983, and that they engaged in several drug smuggling operations together. Most significant was Toombs' testimony concerning a 3,800 pound marijuana importation into Savannah, Georgia in 1978. This importation was the very basis of Harvey's 1978 conspiracy conviction in Georgia.

That the government believed the prior conspiracies to be part of the CCE is further supported by the fact that the government introduced Harvey's Indictments and Judgment and Commitment Orders in the 1974 and 1978 prosecutions into evidence at his CCE trial as Government Exhibits 10A, 10B, 11A, and 11B, in order to prove the required CCE "in concert" element.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. The Decision of the United States Court of Appeals for the Fourth Circuit in this Case is in Conflict with this Court's Recent Decision in Rutledge v. United States.

Just last term, this Court unanimously ruled that a conspiracy under 21 U.S.C. § 846 is a lesser included offense of a CCE under 21 U.S.C. § 848, and that, therefore, it is a violation of the Double Jeopardy Clause for a person to be punished for both conspiracy and CCE based on the same agreement. Rutledge v. United States, ___ U.S. ___, 116 S. Ct. 1241 (1996). The opinion of the United States Court of Appeals for the Fourth Circuit in the instant case is in conflict with that unanimous holding of this Court.

In Rutledge, the petitioner was charged with both a CCE and a conspiracy to distribute cocaine based on his role as head of a drug distribution group from 1988 to 1990. He was sentenced to concurrent life sentences on each count. As with Harvey's case, one of the "series of unlawful acts" alleged to have been undertaken as part of the CCE was the § 846 conspiracy. See Rutledge, ___ U.S. at ___ n.2, 116 S. Ct. at 1244 n.2. After finding that a § 846 conspiracy is a lesser included offense of the CCE charge, this Court ruled that one of Rutledge's convictions along with its concurrent sentence must be vacated. Id. at 1250-51.

The same reasoning applied by this Court in Rutledge should have been applied by the district and circuit courts in Harvey's case. Like Rutledge, Harvey was charged with a conspiracy and CCE based on the same agreement.[1] Unlike

---

[1] As set out supra in the statement of the case, both Harvey's CCE indictment as well as the government's proof at trial demonstrated that the "in concert" element of the CCE charge was based on the same agreement

Rutledge. Harvey had already been convicted of the conspiracy and served his entire sentence.[2] Thus, although the CCE conviction alone amounts to an impermissible second punishment for the same offense, see Rutledge, ___ U.S. at

---

as the earlier conspiracy conviction. Neither the district court nor the court of appeals has found to the contrary in this case. That the government alleged that Harvey engaged in further acts after the initial conspiracy conviction is irrelevant. Once a conspiracy is formed, it is but a single conspiracy regardless of how many substantive acts are taken to further it. As noted sixty years ago by the Fourth Circuit,

> if the government sees fit to send an indictment ... charging a continuous conspiracy for a period of time, it must do so with the understanding that upon conviction or acquittal further prosecution of that conspiracy during the period charged is barred, and that this result cannot be avoided by charging the conspiracy to have been formed in another district where overt acts in furtherance of it were committed, or by charging different overt acts as having been committed in furtherance of it, or by charging additional objects or the violation of additional statutes as within its purview, if in fact the second indictment involves substantially the same conspiracy as the first.... The constitutional provision against double jeopardy is a matter of substance and may not thus be nullified by the mere forms of criminal pleadings.

Short v. United States, 91 F.2d 614, 624 (4th Cir. 1937). Stated differently, "conspiracy, because it is an agreement to violate the law, is a single violation.... Once a defendant has been punished for entering into a conspiracy, he may not be punished again for rejoining the same conspiracy." United States v. Smith, 759 F. Supp. 304, 308-09 (E.D. Va. 1991).

[2] Thus, this case presents the Court with the opportunity to explore the consequences of its holding in Rutledge where there are successive prosecutions as well as multiple punishments based on the same conspiratorial agreement. See Rutledge, ___U.S. at ___ , n.17, 116 S. Ct. at 1250, n.17.

___, 116 S. Ct. at 1248, citing Ball v. United States, 470 U.S. 856, 864-65 (1985), Harvey was punished above and beyond just suffering another conviction. He was actually sentenced to an additional term of imprisonment after having already served out his first sentence in its entirety. This is clearly in contravention of this Court's holding in Rutledge.

Thus, because the court of appeals' opinion in this case conflicts with Rutledge, we respectfully submit that a writ of certiorari should issue to correct that error. See Rules of the Supreme Court of the United States, Rule 10(c).

II. The Decision of the United States Court of Appeals for the Fourth Circuit in this Case is in Conflict with the Decision of the United States Court of Appeals for the Third Circuit in United States v. Grayson.

Faced with virtually the same fact pattern as that presented by the instant case, the United States Court of Appeals for the Third Circuit reached a contrary ruling. United States v. Grayson, 795 F.2d 278 (3rd Cir. 1986). This conflict should be addressed by this Court.

In Grayson, the defendant appealed his February 15, 1985 conviction for engaging in a CCE. Grayson had previously been convicted in 1977 in the United States District Court for the Eastern District of Pennsylvania of conspiracy to manufacture methamphetamine. He also was convicted in 1983 in the United States District Court for the District of Maryland of conspiracy to manufacture phencyclidine. Proof of both of those convictions was admitted at his CCE trial as evidence of predicate acts. Id. at 282. He claimed on appeal, as Harvey does here, that multiple punishments for the conspiracy and CCE convictions based on the same course of conduct amounted to double jeopardy. The Third Circuit agreed. Id. at 287-88.

That court then had to decide how to properly remedy the double jeopardy violation. Noting that Grayson's predicate conspiracy conviction was from the District of Maryland, which is in the Fourth Circuit, the Third Circuit stated that it could not simply vacate the conspiracy conviction. The court went on to note that "once it is determined that Congress did not intend to punish two offenses cumulatively ... '[t]he only remedy consistent with the Congressional intent is for the district court, where the sentencing responsibility resides, to exercise its discretion to vacate the underlying convictions ....'" Id. at 288, quoting Ball v. United States, 470 U.S. 856 (1985). Thus, the court remanded to the district court with instructions to vacate the CCE conviction.

That is precisely what the district court should have done in the instant case. Because Harvey's predicate 1978 conspiracy conviction was from another court, namely, the Southern District of Georgia, the District Court could not have vacated that conviction. Moreover, because Harvey has already completed his sentence for the predicate conspiracies, the only remedy left, as in Grayson, was for the court to vacate the CCE conviction.

In denying Harvey's claim, the district court relied on the fact that "[t]he 1974 and 1978 conspiracies were but a part of the conduct resulting in the 1986 CCE conviction." See (App. at 4-12). The Third Circuit was faced with the same situation in Grayson and, as noted above, held that the CCE conviction created double jeopardy.

Specifically, in Grayson, as here, the defendant was convicted of engaging in a CCE based in part on two prior drug conspiracy convictions. Also as in the instant case, the CCE covered a broader time period than did the prior conspiracies. The CCE charge covered the period "from in or about March 1977 to in or about November 1983." Id. at 285. One of the prior conspiracies, from the Eastern District of Pennsylvania (the same court in which the CCE conviction

would occur), covered the period from "on or about March 29, 1977, to on or about May 4, 1977." Id. The other conspiracy, from the District of Maryland, covered the period from "December 1982 up to and including on or about January 28, 1983." Id. The court noted that of the 26 predicate acts relied upon in the CCE charge,

> [t]wenty-five ... occurred after the Eastern District of Pennsylvania [conspiracy] indictment was filed, and three occurred after the filing of the District of Maryland indictment.

Id. The court further noted that

> [t]he evidence at trial showed Grayson continued to be involved in illegal drug activity as part of the CCE through July 1983, at least four to five months after the return of the Maryland indictment.

Id. at 285-86. Even in light of all that, the court held that Grayson could not be punished for the CCE after having already been punished for the conspiracies. Id. at 287.

Thus, because the decision of the Fourth Circuit in the instant case conflicts with the decision of the Third Circuit in Grayson, a writ of certiorari should issue to resolve that conflict. See Rules of the Supreme Court of the United States, Rule 10(a).

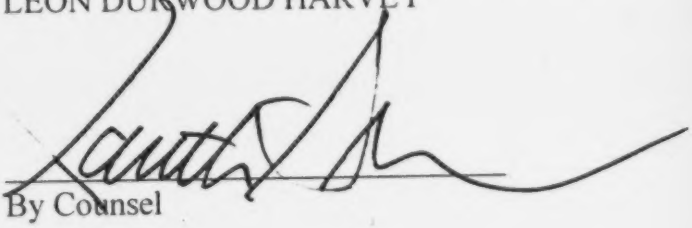
CONCLUSION

Petitioner, Leon Durwood Harvey, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered on January 22, 1997.

For all the foregoing reasons, it is respectfully submitted that a writ of certiorari to the United States Court of Appeals for the Fourth Circuit should be granted.

Respectfully Submitted

LEON DURWOOD HARVEY



By Counsel

Counsel for Petitioner:

Jonathan Shapiro *(Counsel of Record)*
Michael W. Lieberman
Jonathan Shapiro & Associates, P.C.
910 King Street
Alexandria, Virginia 22314
(703) 684-1700

No. _____

In The

Supreme Court of the United States

October Term 1996

LEON DURWOOD HARVEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Appendix to Petition for Writ of Certiorari

Jonathan Shapiro *(Counsel of Record)*
Michael W. Lieberman
JONATHAN SHAPIRO & ASSOCIATES, P.C.
910 King Street
Alexandria, Virginia 22314
(703) 684-1700

Counsel for the Petitioner

THE LEX GROUP ♦ 1205 East Main Street ♦ Suite 2 East ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3256

TABLE OF CONTENTS

Appendix Page

Opinions and Orders

Opinion,
United States Court of Appeals
entered January 22, 1997 ..... App. 1

Memorandum Opinion,
United States District Court for
the Eastern District of Virginia,
Alexandria Division
entered January 27, 1995 ..... App. 4

Order,
United States District Court for
the Eastern District of Virginia,
Alexandria Division
entered September 27, 1995 ..... App. 12

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

LEON DURWOOD HARVEY,
Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Albert V. Bryan, Jr., Senior District Judge.

(CR-85-224-A, CA-95-926-AM)

No. 95-7661

Submitted: December 17, 1996
Decided: January 22, 1997
Entered: January 22, 1997

Before MURNAGHAN and ERVIN, Circuit Judges, and
PHILLIPS, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

COUNSEL

Jonathan Shapiro, Michael William Lieberman, Alexandria, Virginia, for Appellant. Karen Patrice Tandy, Assistant United States Attorney, Alexandria, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Appellant appeals the district court's order denying his motion filed under 28 U.S.C. § 2255 (1994), amended by Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214. He claims primarily that his criminal prosecution for drug-related offenses violated the Double Jeopardy Clause because property previously was civilly forfeited based upon the same underlying conduct. Additionally, he claims that his conviction for engaging in a continuing criminal enterprise (CCE) cannot stand because two prior convictions for drug conspiracies were used as evidence to support his CCE conviction. We affirm.

With regard to the forfeiture issue, we first note that our decision in United States v. 3301 Burgundy Rd., 728 F.2d 655 (4th Cir. 1984), raises serious doubts as to whether there exists a final order of forfeiture of the property at question. In Burgundy Road, we vacated the district court's order directing the forfeiture to the United States of the proceeds from the sale of property allegedly used by Appellant and others as a meeting place to plan ways of smuggling drugs into this country. Id. at 656. On remand, the district court dismissed the action because it had lost jurisdiction over the proceeds, which had been transferred to the Department of Justice in Washington, D.C. In light of our order vacating the order of

forfeiture, we question whether there has been a final order of forfeiture in this case.

Even if there was a forfeiture, there was no double jeopardy violation. The Supreme Court recently held that civil in rem forfeitures under 21 U.S.C. § 881(a)(6) (1994) do not constitute punishment for double jeopardy purposes. United States v. Ursery, ___ U.S. ___ 64 U.S.L.W. 4565, 4571 (U.S. June 24, 1996) (No. 95-345). The forfeiture at issue here was obtained pursuant to § 881(a)(6). Therefore, Appellant's subsequent conviction and sentence did not violate the Double Jeopardy Clause.

Appellant also challenges his CCE conviction on double jeopardy grounds. With respect to this and the remaining issues on appeal, we have reviewed the record, briefs, and other material before us and find no reversible error. Accordingly, we affirm on the reasoning of the district court. United States v. Harvey, Nos. CR-85-224-A; CA-95-926-AM (E.D. Va. Sept. 27, 1995).

We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

LEON DURWOOD HARVEY,

Petitioner,

v. Civil Action No. 95-926-AM

UNITED STATES OF AMERICA,

Respondent.

Entered: January 27, 1995

MEMORANDUM OPINION

On February 14, 1986, the defendant was sentenced to a total of 40 years imprisonment.[1] This sentence was made up of the following: thirty years for engaging in a continuing criminal enterprise, in violation of 21 U.S.C. § 848 (Count 1); 5 years on counts 15 and 16 for influencing a grand jury witness, in violation of 18 U.S.C. § 1503, to run concurrently with each other, but consecutively to the sentence imposed on Count 1; 5 years on Counts 17-19 for income tax evasion, in violation of 26 U.S.C. § 7021, to run concurrently with each other but consecutively to the sentences imposed on Counts 1, 15 and 16; and terms of

---

[1] The court later modified the sentence, leaving only 30 years to serve.

imprisonment concurrent with each other and with the sentences imposed on Counts 1, 15, 16, 17, 18 and 19, for violation of 18 U.S.C. §§ 1961, 1962(d) and 1963 (Count 2, RICO), 18 U.S.C. § 371 (Count 3, conspiracy), 21 U.S.C. § 841(a)(1) (Counts 5, 6, 7, 9, 12, 13 and 14, distribution, possession with intent to distribute, and transporting drugs), 21 U.S.C. § 952(a) Counts 8, 10 and 11, importation of drugs), 31 U.S.C. § 5316, 31 CFR §§ 103.23(a), 103.25(b) and 103.49 (Count 21, failure to file currency report), and 18 U.S.C. § 1952(a)(3) (Counts 22 and 23, interstate travel to facilitate an unlawful activity). Concurrent special parole terms were included in the sentences imposed on Counts 1, 5-14, 15-19, 21, 22 and 23.

The case is before the court on the defendant's motion, filed pursuant to 28 U.S.C. § 2255, to vacate, set aside or correct the sentences. The Government has responded, opposing the motion, and the defendant has filed a reply to the Government's reply.

A number of grounds are asserted in the motion, but the principal ground is that because the Government had, in 1981, sought forfeiture of a home (3301 Burgundy Road) belonging to the defendant, and the home was in fact forfeited, the defendant had been punished by the forfeiture. Thus his 1986 conviction was a second punishment which violates the Double Jeopardy Clause of the Constitution.

On November 18, 1981, the United States initiated a forfeiture action against the Burgundy Road property pursuant to 21U.S.C. § 881(a)(6). The complaint alleged that the property was purchased with the proceeds traceable to exchanges of controlled substances. The defendant's motion asserts that the property was owned by Realcon Investments, Inc. (Realcon),[2] a corporation which was the alter ego of the defendant. Realcon filed an answer denying

---

[2] Realcon is also referred to in the record as Realcon, Inc. The difference is not material to the issues in this case.

the allegations of the complaint, the attachments to which indicated the property was owned by Claw One, Inc., and requesting that the complaint be dismissed. During the progress of the forfeiture action the court, on February 1, 1982, at the request of the parties, ordered that Realcon be allowed to sell the property for $200,000 and deposit the proceeds of sale with the clerk pending resolution of the action.

On February 8, 1982, upon the motion of the Government, the forfeiture action was stayed until March 18, 1982. The Government's stay request stated that a stay was necessary to protect grand jury material in connection with an ongoing criminal investigation. On February 3, 1982, an indictment was returned against the defendant and Michael Lee Harvey for conspiracy to evade payment or income taxes and to defraud the United States in violation of 18 U.S.C. § 371 (Count I), evasion of income taxes in violation of 26 U.S.C. § 7201 (Count II, III and IV), failure to file currency reports in violation of 31 U.S.C. § 1101 and related regulations (Counts V and VI), interstate travel in furtherance of unlawful activity in violation of 18 U.S.C. § 1952(a)(3) (Counts VII and VIII), influencing a grand jury witness in violation of 18 U.S.C. § 15.03 (Counts IX and X), engaging in a continuing criminal enterprise in violation of 21 U.S.C. § 848 (Count XI)[3] conspiracy to import hashish in violation of 21 U.S.C. § 953 (Counts XII), conspiracy to possess with intent to distribute and to distribute hashish in violation of 21 U.S.C. § 846 (Counts XIII and XIV), importing hashish in violation of 18 U.S.C. § 952 (a) (Count XIV), possession with intent to distribute hashish in violation

---

[3] Count XI sought forfeiture of the defendant's interest in the Burgundy Road property pursuant to [then] 21 U.S.C. § 848(a)(2) which provided that, in the event of a conviction for engaging in a continuing criminal enterprise, a defendant forfeited the profits obtained by him in such enterprise and his interest in property affording a source of influence over the enterprise.

of 21 U.S.C. § 841(a)(1) (Count XV), and distribution of hashish in violation of 21 U.S.C. § 841(a)(1) (Counts XVII and XVIII).

Shortly thereafter another indictment was returned (Criminal No. 82-00151-A) charging the defendant and others, including Barry Toombs, with engaging in a continuing criminal enterprise, conspiracy and substantive drug counts, travel act counts, currency reporting violations, a perjury count against one Arthur Meinere, influencing grand jury witnesses, conspiracy to violate the tax laws and to defraud the United States, and substantive tax violations. In some of these counts the defendant was named.

On or about March 14, 1983, Barry Toombs pled guilty to Counts I and X of the indictment in Criminal No. 82-00151-A. As part of his plea agreement, Toombs agreed to forfeit his interest in the assets listed in Count III-B. This list included the $200,00 derived from the sale of the Burgundy Road property. The defendant was also charged in Count III. On the same day, March 14, 1983, a consent order of forfeiture was entered, endorsed by Toombs and his counsel.

On March 21, 1983, the Government moved to dismiss the civil forfeiture action on the grounds that in light of the forfeiture ordered in Criminal No. 82-151, on the occasion of Toombs' guilty plea, the civil action was moot. On April 1, 1983, an order was entered in the civil forfeiture action which (1) dismissed the action with prejudice, and (2) directed the transfer of the $200,000 from the Registry of the Court to the Department of Justice. Realcon objected to the order. On Realcon's appeal, the Court of Appeals remanded the action to the district court for a hearing on the question of ownership. of the Burgundy Road property. United States v. Premises Known as 3301 Burgundy Road, Alexandria, Virginia, 728 F.2d 655 (4th Cir. 1984).

On remand, the district court agreed with the Government's position that because the res was no longer

before the court, the court lost jurisdiction of the case. The court thus on April 30, 1984, granted the Government's motion to dismiss the action for lack of jurisdiction.

The indictment in the instant case was returned on October 16, 1985. The defendant was arrested and his bench trial resulted in the sentences outlined in this opinion's first paragraph.

Forfeiture

The parties both agree that there was a forfeiture. Indeed there must be not only a forfeiture, but a forfeiture that constitutes punishment, to support the defendant's claim of double jeopardy. The forfeiture was effected in the civil forfeiture action. In that action Realcon[4] appeared, asserted an interest in the property, and challenged the allegation that the property was subject to the forfeiture as alleged in the complaint. Thus, is the civil forfeiture action, Realcon put in issue the allegations of the complaint that the Burgundy Road property was purchased with proceeds traceable to exchanges of drugs. This, of course, was a necessary allegation since the forfeiture was an (a)(6) forfeiture. Although the civil action was ultimately dismissed as moot, it became moot after the forfeiture had been affected. The civil action, however, was what accomplished the forfeiture insofar as the defendant is concerned.

The defendant concedes that forfeiture of "proceeds" of a crime cannot be punishment (Reply Brief, p. 2). The defendant argues, however, that the plea agreement with Toombs converted the forfeiture to one grounded on the property's having "facilitated' the criminal activity. The court disagrees. It is true that the order dismissing the case

---

[4] The defendant asserts that Realcon was the defendant's alter ego. Punishment of Realcon is treated as punishment of the defendant. The court accepts this for the purpose of the present motion.

and ordering the transfer of funds referred to the funds as those that had been forfeited in Toombs' criminal case, and once this order was entered there was no longer a res to dispose of in the civil action. But the civil action was what accomplished the sale of the property. In the civil action the defendant, through Realcon, had the opportunity to and did challenge, albeit ultimately unsuccessfully, whether the property represented "proceeds" of criminal activity. The Toombs' plea of guilty and consent to forfeiture, although having the effect of disposing of the res, are simply irrelevant to whether the defendant's interest represented "proceeds." The defendant was not a party to that proceeding and was not bound by it. Had the defendant filed an objection to the April 30, 1984, dismissal of the civil suit, Realcon was still a party to the civil action and could have taken any action it deemed appropriate to challenge the dismissal. It did nothing, although the effect of the dismissal is asserted to be that the defendant lost, in that litigation, his property.

Having concluded that the forfeiture was of "proceeds" and thus not punishment for double jeopardy purposes, the court need not address the interesting questions whether even "facilitating" can ever be considered punishment and whether the forfeiture here is really part of the same criminal proceeding in which the defendant was convicted.

CCE and Conspiracy Convictions

The defendant was tried and convicted in 1974 of a conspiracy to distribute marijuana in violation of 21 U.S.C. § 846 in the Eastern District of Virginia. He was also convicted in 1978 of conspiracy to possess with intent to distribute marijuana, in violation of 21 U.S.C. § 846, in the Southern District of Georgia. The defendant argues that his subsequent conviction here in 1986, in the instant action, for

engaging in a continuing criminal enterprise constitutes double jeopardy because the CCE encompassed the same two conspiracies for which he had already been punished.

The court disagrees. The 1974 and 1978 conspiracies were but a part of the conduct resulting in the 1986 CCE conviction. Thus, those convictions are not prior punishments for double jeopardy purposes. United States v. Garrett, 471 U.S. 773 (1985); United States v. McHan, 966 F.2d 134 (4th Cir. 1992).

Ineffective Representation

The defendant raises two instances of ineffective representation. First, he charges counsel with ineffectiveness in failing to raise the double jeopardy challenge to his prosecution for the CCE offense in the instant action. Having concluded that there is no basis for double jeopardy challenge, the court concludes that the defendant cannot meet the prejudice prong of Strickland v. Washington, 466 U.S. 668, 687 (1984). Second, defendant charges that counsel was ineffective in consenting to a transfer to the Eastern District of Virginia of a four-count indictment returned in the Eastern District of North Carolina. After the transfer, the defendant on February 18, 1986, pled guilty to two conspiracy counts. It is not clear just what is asserted here, but apparently the defendant claims his counsel should have interposed a double jeopardy challenge to the two conspiracy counts to which he pled guilty. Trial counsel's affidavit satisfies the court that, as a matter of strategy, counsel rejected making a double jeopardy challenge in North Carolina and instead negotiated an agreement with the North Carolina authorities for a sentence concurrent with that imposed in Virginia. The court will not second guess counsel's strategy. Strickland, 466 U.S. at 689.

Special Parole Term

The defendant contends that the imposition of special parole terms on his sentences was improper because they were not authorized for the offenses committed by the defendant. The defendant candidly concedes that case law is against him on this issue. The Fourth Circuit, in an unpublished opinion, has also rejected the position of the defendant. United States v. Franck, No. 90-6357, Nov. 13, 1990, 917 F.2d 1302 (Table).

Special Treatment of Witnesses

Challenged in the Government's opposition to provide the specifics of this charge, the defendant has come forward with a statement of a cooperating witness, Robert Reckmeyer, that he was permitted by the Assistant United States Attorney to meet privately with his family and on occasion with is wife alone. He further states that the assistant complained to him that he was being uncooperative. This ground is too late and too little. Reckmeyer's testimony was but a portion of the case against the defendant. Revelation of what Reckmeyer now says could not possibly have altered the outcome of the trial.

* * *

The motion of the defendant will be denied.

/s/ United Sates District Judge

Alexandria, Virginia
September 27, 1995

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

LEON DURWOOD HARVEY,

Petitioner,

v. Civil Action No. 95-926-AM

UNITED STATES OF AMERICA,

Respondent.

Entered: September 27, 1995

ORDER

For the reasons set forth in the Memorandum Opinion this day filed, it is hereby

ORDERED that the motion of the defendant, filed purusant to 28 U.S.C. § 2255, to vacate, set aside or correct, the sentences imposed on February 14, 1986, is denied.

/s/ United Sates District Judge

Alexandria, Virginia
September 27, 1995